No. 11785

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MABEL MONROE BONDS, Appellant,

vs.

SHERBURNE MERCANTILE COMPANY, a Corporation, and HUGH, BLACK, Appellees.

BRIEF OF APPELLEES

SHERBURNE MERCANTILE COMPANY,
a Corporation
and
HUGH BLACK

ART JARDINE
S. B. CHASE, JR.
JOHN D. STEPHENSON
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Attorneys for Appellees

Upon Appeal From The District Court of The United States for the District of Montana

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STATUTES

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PRELIMINARY

There are two reasons why Appellant must fail in her appeal in this action.

First: The United States was and is an indispensable party.

Second: The Final Decree and Judgment of the Montana state court is *res adjudicata* in this action.

JURISDICTION

(a) *The United States is an Indispensable Party.*

The gist of this action is to quiet title in appellant, an Indian, to certain lands within the boundaries of the Blackfeet Indian Reservation in Montana, which appellant claims were originally allotted to her and a trust patent issued to her on or about February 28, 1918. (Appellant's Brief page 1, Record page 5 (which says 1916)).

The complaint further alleges that on or about July 1, 1920, the United States, through the office of the Commissioner of Indian affairs and the Department of the Interior, issued a patent in fee to said lands to appellant (Record pages 5-6).

It is apparent from the complaint and Appellant's brief that the fundamental basis of Appellant's action here is her claim that the fee patent so issued was void, so that the trust status of the land remained unaffected thereby. Thus, on pages 8 to 11 of her brief, Appellant lists eleven questions as presented by this appeal, and seven of them (namely, numbers 1, 2, 3, 5, 7, 9, and 11) directly refer to a forced fee patent or a fee patent issued without Appellant's consent. The remaining four (numbers 4, 6, 8, and 10) all boil down to a question whether it would make any difference if Appellant's name had been forged to a note and mortgage given after the patent issued.

However, these questions are simply collateral and incidental to Appellant's primary contention that the fee patent was void because forced. Appellant commences her argument with the statement that the controversy is based upon the mistaken policy of the United States in forcing fee patents upon Indian allottees on the Blackfeet Indian Reservation (Appellant's Brief page 12); concludes it with the statement that the "treatment of the *forced* patent-in-fee Indians is indefensible" (Appellant's Brief page 36) and continuously refers to such forced fee patents issued without consent throughout the course of the argument.

Similar contentions were considered by the Montana District Court from which this appeal is taken in the cases of *Gerard et al v. Mercer et al,* 62 Fed. Supp. 28, and *Gerard et al v. Sherburne et al,* 69 Fed. Supp. 940; and by this court upon the appeal of the latter case thereto. This court rendered its decision, affirming the judgment of the lower court, on February 11, 1948, in case number 11,591, entitled *Fred Gerard and Rose Gerard, Appellants vs. United States of America, J. L. Sherburne et al Appellees.* The effect of these decisions is that the United States is an indispensable party to an action to set aside a fee patent and enforce the rights of an Indian under a trust patent. Accordingly, when, as here, the Indian as an individual brings the action, his suit must be dismissed.

The jurisdiction of the District Court to entertain this case was challenged by Appellees by motion to dismiss filed as their first pleading in the action (Transcript page 12), which was by the court below denied (Transcript page 14).

It appears that such a motion, that the court lacks jurisdiction of the subject matter, includes the defense of want of jurisdiction because of a defect of parties by reason of the absence of an indispensable party.

See: Montgomery's Manual of Federal Jurisdiction and Procedure (Fourth Edition), page 221, Section 319, note 7, citing:

Hale v. Campbell, 40 Fed. Supp. 584 (D.C. W.D. Ark.) (Rev'sd on other grounds, 127 Fed. (2d) 594 (C.C.A. 8th))

See also:

Young v. Garrett et al (D.C. W.D. Ark.) 3 F.R.D. 193;

Hanson v. Hoffman, 113 Fed. (2d) 780, at p. 790 (C.C.A. 10th).

Also the Fifth Defense in the Answer is that "said Complaint fails to state a claim against Defendants, or either of them, upon which relief can be granted" and dismissal of the complaint is prayed (Record page 21). Lack of an indispensable party was held to result in a complaint failing to state a claim for relief in the case of *Redlands Foothill Groves v. Jacobs,* 30 Fed. Supp. 995, at page 1009 (D.C. S.D. Cal., C.D.).

In any event, the rule is stated in Vol. 2, Moore's Federal Practice on page 2190 as follows:

"If, of course, a truly indispensable party has not been joined, that defect can be raised at any stage, because the theory underlying the concept of indispensable party is that the court cannot enter a just and equitable judgment without the presence of such absent party."

The 1947 Cumulative Supplement to Moore's Federal

Practice states as follows on page 54, as an annotation to Page 2160:

> "Dismissal for failure to join indispensable party.— As stated here in the Treatise and again at p. 2190, if a truly indispensable party has not been joined, that defect can be raised at any stage, because the theory underlying the concept of indispensable party is that the court cannot enter a just and equitable judgment without the presence of such absent party. Calcote v. Texas Pac. Coal & Oil Co., (C.C.A. 5th, 1946) 157 F. (2d) 216; Keegan v. Humble Oil & Refining Co., (C.C.A. 5th, 1946), 155 F. (2d) 971; Brown v. Christman (App. D.C. 1942) 126 F. (2d) 625 (appeal stage); Neher v. Harwood (C.C.A. 9th 1942) 128 F. (2d) 846, 6 Fed. Rules Serv. 19a.1, * * * ."

Since the United States is not a party, and since it cannot be made one since it has not consented to be sued, it would seem this action is subject to dismissal on this ground.

(b) *No other Federal basis.*

It may be contended that even though no jurisdiction exists to consider the questions relating to forced fee patent, there are other issues in the case as presented by questions 4, 6, 8 and 10, relating to the claimed invalidity of a note and mortgage given by Appellant after fee patent had issued, and possibly also by question 2 referring to the note having been given for a preexisting debt (although likewise referring to a forced fee patent), which present issues which the court could consider, even though the United States is not a party, although, on the authority of *United States v. Sherburne Mercantile Co.*, 68 Fed. (2d) 155, it well might be that the United States

is the proper party to bring suit on those grounds also.

Even assuming this to be so, we submit that there is no basis for founding jurisdiction in the Federal court on the basis of those issues alone.

The mere fact that plaintiff is an Indian does not of itself confer jurisdiction on the federal court.

Snyder v. Fancher, 7 Fed. Supp. 597;

Button v. Snyder, 7 Fed. Supp. 597;

Deere v. St. Lawrence River Power Company, 32 Fed. (2d) 550.

There is no claim of diversity of citieznship in the complaint, so as to base jurisdiction on this ground.

Nor is the fact that Appellant's patent was granted under United States laws or Appellant's rights take their origin in United States laws sufficient.

See:

Deere v. St. Lawrence River Power Company, 32 Fed. (2d) 550, where the court said:

"The claim that the St. Regis Tribe was guaranteed or recognized by the United States in treaties does not present a basis for original jurisdiction in the District Court * * * He does not contend for any particular construction of the treaties of 1784 and 1796, nor allege that appellees controvert any such construction."

In the case of *Marshall v. Desert Properties Co.,* 103 Fed. (2d) 551, this Circuit Court of Appeals said:

" * * * . It is well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily, for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such law, upon the determination of which the result depends. Gully v. First National Bank, supra. As said by the Supreme Court in Cook County v. Calumet, etc. Canal Co., 138 U.S. 635, 11 S. Ct. 435, 440, 34 L.

Ed. 1110, 'The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed.' "

STATEMENT OF THE CASE AND QUESTIONS PRESENTED

It is Appellees' contention that this case as now before this court on appeal presents only the following questions:

(a) The question whether the District Court below had jurisdiction and whether this court has jurisdiction since the United States is not a party.

(b) The question of whether the court below was correct in granting Appellees' Motion for Summary Judgment on the basis that a Final Judgment of a Montana state court was *res adjudicata.*

The jurisdictional question, (a) above, has heretofore been considered.

As to the Motion for Summary Judgment, it was made upon the basis that a final judgment of the state courts of the State of Montana quieting the title to the land here in question in favor of Sherburne Mercantile Company (Appellee herein) and against Mabel Monroe Bonds (Appellant herein) was *res adjudicata* (Record page 248), and the motion was granted by the court below on that basis (Record pages 251-252).

This defense was pleaded by Appellees as the Fourth Affirmative Defense in their Answer (Record pages 19-21) and in their subsequent Pleading Supplemental to Answer (Record page 59) which set out the opinion of the Supreme Court of Montana as Exhibit "A" (Record pages 62-64) and the Transcript on Appeal in said action as Exhibit "B" (Record pages 65-215), as well as pleading that said judgment had become final (Record page

60). Thereafter as a result of a pre-trial hearing, the parties stipulated as follows:

"That Plaintiff admits all of the allegations of the Fourth Affirmative Defense with regard to the action in the state court as set forth in the Answer of the defendants herein, and that Plaintiff likewise admits all of the allegations of defendants' Pleading Supplemental to Answer with regard to the action in the state Court, except that Plaintiff does not admit the conclusion therein set forth that the Decree and Judgment is *res judicata,* but leaves the determination of such matter to the Court as a matter of law." (Record page 227-228).

As a result of this stipulation admitting these *facts,* a clear issue of law was presented as to whether the Montana State Court proceedings, in themselves, constituted a valid defense of *res adjudicata* so that the case should be dismissed without the necessity of trying and determining the other complicated issues raised by the complaint, the answer and the other defenses therein contained, and the reply. Appellees brought this issue of law on for determination by Motion for Summary Judgment (Record page 248) and the Court entertained and granted the same upon this basis (Record pages 251-252, 254 and 256).

CONSIDERATION OF APPELLANT'S LIST OF QUESTIONS PRESENTED

As we have pointed out under "Jurisdiction," Appellant lists, on pages 8 to 11 of her brief, eleven questions as presented on this appeal. Seven of these (numbers 1, 2, 3, 5, 7, 9 and 11) deal directly with her contention that a fee patent was invalid and void because issued without Appellant's consent.

Certainly the seven questions dealing with the validity of the fee patent are necessarily eliminated from consideration by either this court or the court below for two reasons:

(a) The United States is an indispensable party to the consideration of such questions for the reasons set forth under "Jurisdiction."

(b) This is a suit by Appellant as an individual in which it is conceded that a fee patent has issued (the Complaint so alleges; see Record pages 5-6) and in such a suit the validity of the patent cannot be collaterally attacked:

Chatterton v. Lukin, 116 Mont. 419, 154 Pac. (2d) 798 (cert. den. June 18, 1945, 325 U.S. 880, 89 L. Ed. 1996, 65 S. Ct. 1572);

Steele v. St. Louis Smelting & Refining Co., 106 U.S. 447, 27 L. Ed. 226, 1 Sup. Ct. 389;

DeGuyer v. Banning, 167 U.S. 723, 42 L. Ed. 340;

U. S. v. Throckmorton, 98 U.S. 61, 25 L. Ed. 93.

"A suit to cancel a patent must be brought by the United States, and unless by virtue of an act of Congress, no one but the attorney general, or someone authoriezd to use his name can initiate the proceeding."

50 Corpus Juris, page 1114.

The other four questions set forth by Appellant all reduce to a single one as to whether it would make any difference if Appellant's name had been forged to a note and mortgage.

We believe it is a fair construction of Appellant's brief to state that these remaining four questions are simply collateral and incidental to her primary contention that the fee patent was void because forced, and that when the primary contention fails (as it must because it is one

which must be made by the United States as an indispensable party) Appellant's whole argument collapses, and the case must be dismissed.

But even if the question as to whether the note and mortgage were valid remains separate and apart from the question of forced fee patent, that question is conclusively disposed of by the fact that the Montana state court had disposed of it by a judgment and decree which is *res adjudicata* in the present case.

As a matter of fact, *all* of Appellant's questions, including the questions of forced fee patent, trust patent, preexisting indebtedness, etc. were raised by her as defenses in the Montana court proceeding, in which in addition she sought affirmative relief and asked title to be quited in her, and have been disposed of therein by the final judgment and decree of that court.

Therefore, the question presented (in addition to the jurisdictional one) necessarily boils down to the effect of the Montana court's judgment and decree as *res adjudicata.*

SUMMARY OF ARGUMENT

(1) *Res Adjudicata.*

- (a) How the defense was presented.
- (b) Authorities supporting such presentation.
- (c) The action in the Montana Court was commenced prior to this action and final decree entered prior to any decree herein.
- (d) The Montana Court had jurisdiction to render the decree quieting title.
- (e) The fact that Appellant is an Indian or that construction of Federal laws relating thereto might be involved did not defeat the jurisdiction of the Montana Court.

(f) The Decree and Judgment of the Montana Court was rendered on the merits, and Appellant by answer and counterclaim raised therein the issues she raises herein.

(g) The Montana Judgment and Decree was not based entirely on statutes of repose, as Appellant contends.

(h) Even a Decree based solely on conclusions of adverse possession and laches would be valid and binding on Appellant.

(i) The Opinion of the Supreme Court of Montana.

(2) Appellants' Authorities.

(3) Conclusion.

ARGUMENT

1. *Res Adjudicata.*

(a) *How the Defense was Presented:*

In her complaint Appellant sought to quiet title to certain land in the State of Montana against Appellees, Sherburne Mercantile Company, a corporation, and Hugh Black (Record pages 3-10). Appellees' answer thereto both contained denials of the various allegations of this complaint (along with certain admissions), and likewise five affirmative defenses thereto (Record pages 16-22). The Fourth Affirmative Defense pleaded in effect that Sherburne Mercantile Company, in an action to quiet title against said Mabel Monroe Bonds prosecuted in the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Glacier, had on June 15th, 1942, obtained a judgment decreeing it to be the owner of the lands here in question and quieting its title thereto as against said Mabel Monroe Bonds, Appellant herein, and that said action involved the same cause of

action as was involved in the present proceedings (Record pages 19-21). Thereafter, by leave of Court obtained, Appellees filed a Pleading Supplemental to Answer, setting forth that said judgment had been affirmed by the Supreme Court of the State of Montana and that the same had in all respects become a final judgment (Record pages 59-215). There was attached to this supplemental pleading, as an exhibit, a complete transcript of the record in the lower court as well as the opinion of the Supreme Court in the matter. Thereafter, as a result of a pre-trial conference, it was stipulated that Appellant admitted all of the allegations of the Fourth Affirmative Defense with regard to the action in the state court, and likewise all of the allegations of the Pleading Supplemental to Answer with regard to the action in the state court "except that plaintiff does not admit the conclusion therein set forth that the Decree and Judgment is *res judicata*, but leaves the determination of such matter to the court as a matter of law." (Record pages 227-228). Following this, Appellees brought on for determination of the court the issue of law so presented by filing their motion for summary judgment (Record pages 248-249). The basis of the motion was that any questions of fact as to that particular issue had been eliminated by the stipulation, so that simply an issue of law remained to be decided, and therefore if that issue where then considered and should be decided in favor of defendants, the necessity of trying the other issues raised by the answer and the other affirmative defenses therein should be avoided.

(b) *Authorities Supporting such Presentation:*

We believe the situation thus presented in the present case was similar to that presented in *Momand v. Para-*

mount Pictures Distributing Co., 6 Fed. Rules Decisions, page 222. In that case, defendants, after having filed their answers, thereafter moved for leave to file supplemental answers setting up affirmative defenses of estoppel by judgment. Since the original answers had been filed in 1937 and the judgments relied upon not entered until 1944, it was necessary in that case to obtain leave to present these judgments by supplemental answer. This is similar to the situation which was heretofore presented in our present case, and the court in the *Momand* case, as did the court in our present case, granted leave to file the supplemental answers.

In the *Momand* case, the defendants then filed a motion asking a separate trial of the issue of the defense of estoppel by judgment as raised by the supplemental answers, pointing out that if this defense were proved, it would put an end to the cases and avoid a complicated trial of the many other issues involved in the case. The court in the *Momand* case granted the motion for the trial of this issue of estoppel by judgment in advance of other issues, as being in furtherance of convenience, as provided for in Rule 42 (b) of the Federal Rules of Civil Procedure.

In our present case the necessity of any trial on the issues of *fact* involved in the defense of *res adjudicata* had been obviated as a result of the stipulation entered into following the pre-trial hearing, so that determination of the issue of law was properly authorized at the time the motion for summary judgment was presented by virtue of the provisions of Rule 42 of the New Federal Rules. In Vol. 3 of Moore's Federal Practice the following statements appear on page 3051:

"This principle of separate trial has also been applied as to legal and equitable issues. It may also be desirable in many situations to hold a hearing in advance of the main trial on certain defenses, especially those going to jurisdiction and venue. Another example would be where the defendant to a patent infringement action pleaded license and invalidity of the patent. If the license defense is tried in advance of the issue of validity and is decided in favor of the defendant, the necessity of trying the much more complicated issue of validity is avoided, unless, of course, the lower court is reversed on appeal. The same would often be true as to defenses of the statute of limitations or the statute of frauds, which might be tried advantageously before the balance of the case."

See also:

Karolkiewicz v. City of Schenectady,
28 Fed. Supp. 343;

Momand v. Paramount Pictures Dist. Co.,
36 Fed. Supp. 568, at 571.

The effect and function of the presentation of the motion for summary judgment was to request the court to decide the defense of *res adjudicata* as a matter of law at that time, as authorized by Rule 42.

In the case of *Eberle v. Sinclair Prairie Oil Co.*, 35 Fed. Supp. 296, affirmed 120 Fed. (2d) 746, following the filing of the complaint, defendant filed both a motion to dismiss and a motion for summary judgment. Each of these motions was based upon the defense of *res adjudicata* because of proceedings had in the state court, copies of which were attached to the motions. On the hearings upon these motions, plaintiff's attorney, in response to a question by the court, admitted the proceedings had in the state court as set forth in the motions. The court held that since a motion to dismiss was directed solely to the allegations in the complaint and to those allegations alone, the

motion to dismiss would not be granted. The court did, however, grant the defendants' motion for summary judgment on the basis of the plaintiff's admission of the state court proceedings, thus disposing of the case.

For other cases where summary judgments have been granted on the basis of a defense of *res adjudicata* see:

Billings Utility Co. v. Advisory Committee, 135 Fed. (2d) 108;

Mitchell v. Village Creek Drainage District, 158 Fed. (2d) 475.

(c) *The Action in the Montana Court was commenced Prior to this action and final Decree entered prior to any Decree herein.*

Appellant herein filed her individual action to quiet title in the Federal court below on February 16th, 1942 (Record page 2). It appears from the Pleading Supplemental to Answer (and is admitted by Appellant's stipulation as aforesaid) that on April 12, 1941, Sherburne Mercantile Company (one of Appellees herein) filed an action in the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Glacier, to quiet title to this same real estate, and that Mabel Monroe Bonds (the Appellant herein) was named as a defendant therein (Record pages 68-69). It is interesting to note that Appellant filed her action in federal court the *day before* the case before the Montana court came on for *trial and hearing on the merits*, on February 17, 1942 (Record page 118).

Both of these actions were actions in *rem*, involving the same subject matter and these same parties.

On June 15th, 1942, the Montana District Court rendered its judgment quieting title to the lands here in question in Sherburne Mercantile Company; the Decree

adjudging Sherburne Mercantile Company to be the true and lawful owner of the property, quieting its title as against all claims, demands or pretensions of the defendant Mabel Monroe Bonds, decreeing any claims of Mabel Monroe Bonds to the property to be invalid and groundless, and perpetually enjoining Mabel Monroe Bonds from setting up any claims thereto (Record pages 205-206). Appellant Mabel Monroe Bonds appealed that Decree to the Supreme Court of Montana (Record page 214), which on February 10th, 1944, affirmed the Decree (Record pages 62-64). No petition for rehearing was filed by said Appellant within the ten days allowed by the rules of the Supreme Court of Montana, or at all, and on February 28th, 1944, the Supreme Court of Montana issued its remittitur affirming the Decree of the District Court, which said remittitur was received and filed by the Clerk of said District Court on March 1, 1944 (Record page 59-60). The time for appeal to or application for writ of *certiorari* from the Supreme Court of the United States had long since expired and the Decree and Judgment of said Montana District Court had become and was a final judgment at the time the Pleading Supplemental to Answer was filed in the court below on December 13th, 1944 (Record page 59).

Since the action in the state court was filed April 12, 1941, and the present action was filed in Federal court on February 16, 1942, the state court, having "possession" of the *res*, had the full power to determine all controversies with respect thereto. (See Montgomery's Manual of Federal Jurisdiction and Procedure (4th Ed.) page 75, Sec. 104).

Furthermore, since the Judgment in the state court became final prior to any judgment in the court below and was pleaded therein, it constitutes *res adjudicata.* (See Montgomery's Manual of Federal Jurisdiction and Procedure (4th Ed.) page 76, Sec. 105).

(d) *The Montana Court had jurisdiction to render the Decree quieting title.*

The record considered in the Montana court (Exhibit "B" to the Pleading Supplemental to Answer; Record pages 65 ff) shows, among other things, that a fee patent issued from the United States to Mabel H. Monroe (now Mabel Monroe Bonds) dated December 12, 1918 (Record page 159), and it further shows that in 1919 she wrote for the patent (Record pages 173, 178-179), that a receipt therefor, dated September 25th, 1919, was signed "Mabel H. Monroe" (Record page 170), and that the mortgage, the foreclosure of which resulted in Sheriff's Deed to Sherburne Mercantile Company, was given October 13, 1920 (Record page 129). In other words, the Montana court was dealing with a case involving an action to quiet title to land situate in Montana where a fee patent had issued. Under these circumstances, it had jurisdiction. The action was to quiet title under the provisions of Section 9479 of the Revised Codes of Montana of 1935 (relevant portions are set out in the Appendix).

In 42 Corpus Juris Secundum "Indians," on pages 811-812, it is stated:

> " * * * Where, however, the trust affecting, and the restriction on alienation of, land allotted to an Indian have been terminated by the issuance of a fee simple patent, pursuant to the provisions of 25 USCA, Sec. 349, all questions relating to title become subject to examination and determination by the courts of the

state in which the land is situated, which otherwise have jurisdiction. * * * "

See also:

People v. Pratt, 26 Cal. App. (2d) 618, 80 Pac. (2d) 87;

Milne v. Leiphart (Mont.) 174 Pac. (2d) 805.

Since the patent had issued and the land was located in Montana, the state court had jurisdiction of the subject matter.

In the case of *United States v. Candelaria,* 291 U. S. 432, 70 L. Ed. 1023, the court, after stating that a decree of a New Mexico court quieting title to Indian lands would not bind the United States, since it was not a party, went on to hold:

" * * * our answer to the question [i.e. did the New Mexico court have jurisdiction] is that the state court had jurisdiction to entertain the suit and proceed to judgment or decree. Whether the outcome would be conclusive on the United States is sufficiently shown by our answer to the first question."

Appellant Mabel Monroe Bonds appeared in the action in the Montana state court on May 7th, 1941 (Record page 70), and in fact, in her answer she included a "counterclaim" claiming that title to the land should be quieted in her (Record page 92), thereby submitting her own claim of title to that court, as she was entitled to under Article III, ss. 6 of the Montana Constitution (See Appendix).

(e) *The fact that Appellant is an Indian or that Construction of Federal laws relating thereto might be involved did not defeat the jurisdiction of the Montana Court.*

The fact that Mabel Monroe Bonds is an Indian does not confer exclusive jurisdiction on the Federal court; an Indian has no right to insist that a cause be tried only

in Federal court simply because he is an Indian, and this is true as to unnaturalized Indians as well as to those who are citizens. See Vol. 4, Hughes Federal Practice, Jurisdiction and Procedure, Sec. 2321, page 96 and Note 99; *U. S. v. Waldo*, 294 Fed. 111; affirmed 269 U. S. 13; *Snyder v. Fancher*, 7 Fed. Supp. 597; *Button v. Snyder*, 7 Fed. Supp. 597; *Deere v. St. Lawrence River Power Company*, 32 Fed. (2d) 550.

Such a case is not a case wherein the Federal courts are given exclusive jurisdiction by statute. (See 28 U.S.C. A. Sec. 371).

Also the mere fact that the case might involve a federal question so that the Federal Court would have jurisdiction to entertain it, does not deprive the Montana court of concurrent jurisdiction.

See Montgomery's Manual of Federal Jurisdiction and Procedure (4th Ed.) page 74, Sec. 102; page 75, Sec. 103; and page 77, Sec. 106.

That is the holding in the citations from Montgomery. That is the holding in numerous cases collected in 28 U.S.C.A. Sec. 41 (1), Note 404, on page 154, also Note 404 on page 144 of the 1947 Appendix. And specifically with regard to Indian affairs, and treaty and constitutional rights, that is the holding in *U. S. v. Tyler*, 296 U. S. 13, 70 L. Ed. 138, where the court says on page 143 of Lawyer's Edition:

> " * * * insofar as they involve treaty or constitutional rights, those courts are as competent as the Federal courts to decide them. In the regular and ordinary course of procedure, the power of the highest state court in respect of such questions should first be exhausted. When that has been done, the authority of this court may be invoked to protect a party against

any adverse decision involving a denial of a Federal right properly asserted by him."

The reason for the rule becomes immediately apparent from this quotation. If a litigant in the state court is improperly denied a Federal right, he can take his case to the Supreme Court of the United States for relief. That is the most he can do if denied the right in a lower Federal court. The ultimate protection of Federal rights rests in the same body, the United States Supreme Court, whether the action is prosecuted in a state court or a Federal District Court.

From the foregoing it is apparent that the Decree quieting title in favor of Appellee Sherburne Mercantile Company against Appellant herein as to the land here involved, was a final Decree rendered within jurisdiction of the state court in a suit commenced prior to the institution of the suit in the lower Federal court and becoming final before any Decree had been rendered by the Federal lower court.

(f) *The Decree and Judgment of the Montana Court was rendered on the merits, and Appellant, by answer and counterclaim raised therein the issues she raises herein.*

There can be no question that the judgment rendered by the Montana court was rendered on the merits and after consideration of the same issues raised in the federal court. We refer the court to Exhibit B, attached to the Supplemental Pleading, which is a copy of the complete transcript of the state district court proceedings in the case. (Record pages 65-215).

In order to clarify for this court some of the matters considered in the Montana court, we call its attention to the following, the Record page reference in each case re-

ferring to matters appearing in Exhibit B attached to the Supplemental Pleading:

(a) In her amended answer and cross-complaint Mabel Monroe Bonds, after denying plaintiff's title, set up five separate defenses alleging invalidity of the note and mortgage and the foreclosure proceedings based thereon, and likewise a counterclaim wherein she affirmatively sought to have title quieted in herself. (Record pages 71-94).

(b) At the opening of the trial, she sought and obtained permission to file additional separate defenses seven and eight (Record page 119). The seventh defense alleged that Mabel Monroe Bonds as an Indian ward received a trust patent under Section 348 of Title 25 U.S.C.A., that Sherburne Mercantile Company, without her knowledge or consent, had a fee patent issued to her, and then took a mortgage which was later foreclosed; and that under sections 331-334, 336 and 348 of Title 25 U.S.C.A., the fee patent and mortgage were fraudulent as well as under sections 352a and 352b of the same Title. (Record pages 107-112). The eighth defense alleged substantially the same things, and additionally attacked the validity of the foreclosure proceedings and alleged the mortgage to be null and void because the land was held in trust and because the obligation accrued before fee patent issued, thereby contravening section 354 of Title 25 U.S.C.A. (Record pages 112-117). She again prayed that she be decreed to be the owner of the land. (Record page 117).

(c) At the trial a Judgment Roll in an action conducted in the Montana District Court for Glacier

County wherein Sherburne Mercantile Co. (the Appellee herein) was plaintiff and Mabel H. Monroe (now Mabel Monroe Bonds, the Appellant herein) was a defendant was first introduced in evidence (Record pages 121-145). The Judgment and Decree rendered November 16, 1922, found that the land there involved (the same as the land here involved) had been mortgaged by said Mabel H. Monroe to said Sherburne Mercantile Co. on October 13, 1920, to secure a note of even date and decreed the foreclosure thereof (Record pages 141-145). Incidentally, the Judgment Roll sets forth an Answer verified by Mabel H. Monroe before a Notary Public (Record pages 139-140). Evidence showing a sheriff's sale of the premises pursuant to the Decree and the issuance of a Sheriff's Deed to the property dated December 20, 1923, to Sherburne Mercantile Company was then introduced (Record pages 147-159).

(d) Thereupon there was introduced in evidence a fee patent covering the land there and here involved issued by the United States to said Mabel H. Monroe dated December 12, 1918 (Record pages 159-161). It will be noted that this patent was issued long prior to the mortgage so foreclosed which was given on October 13, 1920.

(e) Defendants' case was thereupon put in (Record pages 162-186). In the course thereof a trust patent dated February 28, 1918, was put in evidence (Record pages 166-168). Likewise there was put in evidence a receipt for the *fee* patent, dated Sept. 25, 1919, and signed "Mabel H. Monroe." (Record page 170). Mabel Monroe Bonds testified; and, with regard to the fee

patent, stated that she had heard patents were being issued and wrote for hers in 1919 (Record page 173) and her letter was introduced (Record page 179).

(f) The defendant, Mabel Monroe Bonds, filed proposed findings of fact and conclusions of law embracing the issues of trust patent, "forced" fee patent, Indian ward, etc. etc. (Record pages 207-212).

The foregoing references to the transcript in the Montana State Court proceedings are made, not with any idea that this court (or the federal court below) should pass upon their merits (the Montana court did that), but as demonstrating that the cause which the plaintiff here is now trying to try in the federal court has already been tried on its merits in the state court.

It is apparent from the foregoing references to the record in the Montana court, that the issues and questions presented by the Appellant in the federal court, were by her presented to and considered by the Montana court. Such issues were not limited to mere consideration of the validity of the note and mortgage and the foreclosure proceedings alone, but embraced also the questions of the validity of the fee patent and the other matters raised herein relating to the federal laws concerning Indians as well.

The fact that Appellant was a defendant in the state court action and a plaintiff in the federal court action subsequently filed does not alter the situation:

30 Am. Jur. "Judgments" p. 935, says:

"In a particular case, the same circumstances may constitute a defense to a cause of action as well as sufficient basis for the interposition of a counterclaim or the maintenance of an independent cause of action. On the theory that a party may not recover in an independent action on a claim which he failed to interpose

in a prior action by way of setoff or counterclaim, but which was necessarily adjudicated by the former judgment, it is generally held that a subsequent independent action for affirmative relief is barred by a judgment in a prior action in which the matter forming the basis for the claim for relief was interposed as a defense."

As a matter of fact, as we have seen, Appellant in the state court action did ask affirmatively for a decree quieting title in her.

Finally, since both the state court action and the federal court action were actions to quiet title, it is not necessary that Appellant should actually have raised all the issues and claims in support of her alleged title in order for the Montana judgment to be conclusive; it is sufficient that in that action such issues or claims *could* have been raised therein:

34 Corpus Juris "Judgments" p. 959, says:

"h. Action to Quiet Title. In this form of action all matters affecting the title of the parties to the action may be litigated and determined, and the judgment is final and conclusive, and cuts off all claims or defenses of the losing party going to show title in himself, from whatever source derived, and which existed at the time of the suit, whether pleaded therein or not. * * * ."

See also:

Fulsom v. Quaker Oil & Gas Co.,
28 Fed. (2d) 398, aff'd;
35 Fed. (2d) 84.

(g) *The Montana Judgment and Decree was not based entirely on statutes of repose, as Appellant contends.*

Appellant contends that the decree of the Montana state court quieting title in favor of Sherburne Mercantile Company was based entirely on statutes of repose (see Appellant's Brief pages 25-27). In answer we refer the court to the findings of fact and conclusions of law made by

that court (Record pages 197-198). We particularly refer the court to Finding of Fact number 2 as follows:

"2. That Plaintiff is now, and ever since the *20th day of December, 1923*, has been, the owner and entitled to the possession of the lands described in Plaintiff's Complaint." (Record page 197).

As we have pointed out, the record showed a fee patent issued to Mabel Monroe Bonds on December 12, 1918, a mortgage given October 13, 1920, a foreclosure thereof thereafter had and Sheriff's Deed issued to Sherburne Mercantile Company *on December 20, 1923*. Obviously, a finding that Sherburne Mercantile Company was the owner since December 20, 1923, could not be based on laches, statutes of limitation or adverse possession (the period in Montana is 10 years plus payment of taxes; see Sections 9015, 9016, 9017, 9018, 9019 and 9024 Revised Codes of Montana of 1935, set forth in full in the Appendix hereto).

Also we point out Conclusion of Law number 5:

"5. That Plaintiff is entitled to a decree quieting its title to the lands described in Plaintiff's Complaint and forever enjoining and debarring Defendants, and each and all of them, from asserting any claim whatsoever in or to said lands, or any part thereof." (Record page 198).

In her brief Appellant argues that Conclusion of Law number 5 is based on the preceding four conclusions. This, of course, cannot be so, since conclusions of law are not based on conclusions of law, but upon findings of fact. Finding of Fact number 2 fully supports Conclusion of Law number 5.

Other findings of fact and conclusions of law do relate to adverse possession and laches and thereby provide *additional* bases for the decree in favor of Sherburne Mercantile Company, but they are in addition to the finding of ownership since December 20, 1923, as aforesaid, which finding necessarily must be based on the fact that the fee patent was validly issued and the foreclosure proceedings validly had so that the Sheriff's Deed issued on that date vested good title in Sherburne Mercantile Company as against all claims of Mabel Monroe Bonds.

(h) *Even a Decree based solely on conclusions of adverse possession and laches would be valid and binding on Appellant.*

Furthermore, even if the Decree were based solely upon conclusions of adverse possession and laches, that would necessarily imply findings and conclusions that a valid fee patent had issued. In other words, under the issues raised by the pleadings and proof in the case as tried in the state court, the court, in order to find adverse possession had run and laches had occurred, would of necessity have decided that a valid fee patent had issued so as to start the necessary periods running.

Thus in 2 Corpus Juris *"Adverse Possession"* p. 219, Sec. 458, it is said:

> "C. Indians or Their Grantees. There can be no adverse possession of land prior to the extinguishment of the Indian title, and where land which has been allotted to Indians by the United States is held by an Indian title, that is, where the title is vested in the United States and an Indian, so that there can be no alienation by the latter without the consent of the United States, no title by adverse possession can be acquired in the land. *But where the title of the Indian is coupled with the power of unrestricted alienation the land is subject to the operation of the statute."* (Italics ours)

Note 81 (a) to the foregoing section reads as follows:

"Where restrictions on alienation are removed and the Indian possesses an unencumbered title in fee simple, he is chargeable with the same diligence in beginning an action for the recovery of land to which he has title as other persons having title to lands. Schrimpscher v. Stockton, 183 U. S. 290, 22 S. Ct. 107, 46 L. Ed. 203."

This rule is repeated in *Vol. 2 Corpus Juris Secundum Adverse Possession*" page 515, Sec. 5 a, where it is said:

"Indians or Their Grantees. There can be no adverse possession of land while the title remains in Indian tribes. Where title to land which has been allotted to an Indian is vested in the United States and the Indian and there can be no alienation by the latter without the consent of the United States, no title by adverse possession can be acquired in the land; *but where the title of the Indian is coupled with the power of unrestricted alienation, the land is subject to the operation of the statute.*" (Italics ours).

This is confirmed by the following quotation from *United States v. Brooks*, 32 Fed. Supp. 422, at page 427 (D.C. Ind., 1940):

"An Indian who has obtained patent in fee to his allotment not only is a citizen of the United States, but has all the rights, privileges and immunities of citizens of the United States and is subject to the civil and criminal laws of the state. He is no longer a ward of the government. State v. Big Sheep, 1926, 75 Mont. 219, 243 P. 1067."

(i) *The Opinion of the Supreme Court of Montana.*

In the Montana proceedings, Appellant appealed from the judgment of the lower court to the Supreme Court of Montana. As appears from its opinion (Record page 62): (also see *Sherburne Mercantile Co. v. Bonds,* 115 Mont. 464, 145 Pac. (2d) 827), her Bill of Exceptions was stricken from the record on appeal for the reason it

was not presented for settlement within the time allowed by law.

The Montana statute (Section 9390 Revised Codes of Montana 1935; the relevant portions being set out in the Appendix hereto) imposes the affirmative duty on the party appealing from the judgment to present the bill for settlement within a prescribed time.

A bill not presented for settlement in time is a nullity and cannot be considered on appeal, even though counsel agree as to its consideration.

O'Donnell v. City of Butte,
72 Mont. 449, 235 Pac. 707.

Therefore, the Supreme Court was necessarily limited to reviewing the record which Appellant had caused to be presented.

The Montana district court, as we have seen, considered the matter fully on its merits. Appellant, by properly pursuing the necessary procedural steps, could have presented the full record to the Montana Supreme Court for consideration and review, but failed to do so. That failure gives no foundation for now contending that the Montana proceedings were not on the merits. The Supreme Court of Montana passed upon and decided all matters which Appellant's appeal and record thereof placed before it for decision and it could pass upon.

2. APPELLANT'S AUTHORITIES

We do not intend to go into a detailed analysis of the authorities cited by Appellant, as we believe that the foregoing sets forth the correct approach to the questions presented, and the authorities supporting the same.

As we have pointed out, the fundamental basis of Appellant's claim is that the fee patent issued to her was

"forced," so that the trust status of the land remained unchanged. But the United States is an indispensable party to a proceeding to avoid the fee patent and establish the trust status of the land. Therefore cases cited by Appellant where the *United States* has accomplished such a result are not authority for the contention that Appellant, suing as an individual, can accomplish the same result. We refer particularly to cases such as *United States v. Glacier County*, 17 Fed. Supp. 411, aff'd 99 Fed. (2d) 733; *United States v. Ferry County*, 24 Fed. Supp. 399; *United States v. Frisbee*, 57 Fed. Supp. 299; *United States v. Sherburne Mercantile Co.*, 68 Fed. (2d) 155; and *United States v. Candelaria*, 271 U. S. 432, 70 L. Ed. 1023.

Appellant likewise contends that the motion for summary judgment *admitted* all the proceedings and evidence in the transcript of the state court proceedings to be true (Appellant's Brief page 18). In the first place, the motion was not a motion for judgment on the pleadings, but was addressed simply to the proposition that the state court proceedings (stipulated by Appellant to have occurred as pleaded) were *res adjudicata* as a matter of law; and in the second place, the only "admission" would be that those proceedings had been had and that that evidence had been introduced in the state court and that the state court had rendered its said judgment and decree based thereon.

As we have seen, Appellant in the state court proceeding was entitled to raise, and in fact did raise, all questions which she raises in her federal court action, including the questions relating to forced fee and trust patents. In the state court action, the Supreme Court of the United States was available to her as a final arbiter, in the event

any federal rights of hers should be violated, just as it was to *Marchie Tiger* in the case of *Tiger v. Western Inv. Co.*, 221 U. S. 286, 55 L. Ed. 738 (cited on page 36 of Appellant's Brief), where the action arose in the Oklahoma State court, went to the United States Supreme Court, and was remanded to the Supreme Court of Oklahoma for proceedings in accordance with the United States Supreme Court's opinion.

We can see no basis for contending that Appellant was in any way deprived of a full and fair trial on the merits when the case was tried in the Montana court and believe that any doubt on this can be resolved by reading the transcript of the proceedings had in that case (Record pages 65-215).

CONCLUSION

It is respectfully submitted that the judgment of dismissal entered by the court below was correct as entered on the basis that the final decree and judgment of the Montana court is *res adjudicata* in this action.

It is further respectfully submitted that this action must be dismissed for lack of an indispensable party and federal jurisdiction.

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APPENDIX

REVISED CODES OF MONTANA OF 1935

9015. Seizin within ten years—when necessary in actions for real property—action for dower. No action for the recovery of real property or for the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question within ten years before the commencement of the action. No action for the recovery of dower can be maintained by a widow unless the action is commenced within ten years after the death of her husband.

9016. Such seizin, when necessary in action or defense arising out of title to or rents of real property. No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question within ten years before the commencement of the act in respect to which such action is prosecuted or defense made.

9017. Entry on real estate. No entry upon real estate is deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after making such entry, and within ten years from the time when the right to make it descended or accrued.

9018. Possession — when presumed — occupation deemed under legal title, unless adverse. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title for ten years before the commencement of the action.

9019. Occupation under written instrument or judgment—when deemed adverse. When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property, under such claim, for ten years, the property so included is deemed to have been held adversely, except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

9024. Occupancy and payment of taxes necessary to prove adverse possession. In no case shall adverse possession be considered established under the provision of any section or sections of this code unless it shall be shown that the land has been occupied and claimed for a period of ten years continuously, and the party or persons, their predecessors and grantors, have, during such period, paid all the taxes, state, county, or municipal, which have been legally levied and assessed upon said land.

9390. Exceptions not presented at time of ruling—notice to adverse party, how settled upon, etc. Whenever a motion for a new trial is pending, no bill of exceptions need be prepared or settled until the decision of the court upon motion for a new trial has been rendered, but a bill shall be prepared and settled in the same manner and within the same length of time after the decision on the motion for a new trial as is hereinafter provided for the making and settling of bills of exceptions. Except as above provided, the party appealing from a final judgment, if he desires to present on appeal the proceedings had at the trial, must, within fifteen days after the entry of judgment if the action was tried with a jury, or after receiving notice of the entry of judgment if the action was tried without a jury, or within such further time as the court or judge thereof may allow, not to exceed sixty days, except upon affidavit showing the necessity for further time, prepare and file with the clerk of the court and

serve upon the adverse party a bill of exceptions, containing all of the proceedings had at the trial upon which he relies, in which bill the evidence shall, unless otherwise prescribed by a rule of the supreme court, be stated in narrative form, except that the particular portion of the record showing objections to the admission or rejection of testimony upon which the party preparing the bill expects to rely, shall be set out verbatim. * * * * * * .

9479. Actions to quiet title to real property—parties—venue. An action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons, both known and unknown, who claim or may claim any right, title, estate, or interest therein, or lien or encumbrance thereon, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued, for the purpose of determining such claim or possible claim, and quieting the title to said real estate.

CONSTITUTION OF MONTANA — ARTICLE III.

Sec. 6. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character; and that right and justice shall be administered without sale, denial, or delay.